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**In the Supreme Court of the United States**

**OCTOBER TERM, 1950**

**No. 298**

**LEO ZITTMAN (WITH WHOM THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK WAS IMPEACHED BELOW), PETITIONER**

**J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN**

**No. 299**

**LEO ZITTMAN (WITH WHOM THE FEDERAL RESERVE BANK OF NEW YORK WAS IMPEACHED BELOW), PETITIONER**

**J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN**

**No. 314**

**JOHN F. MCCARTHY (WITH WHOM THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK WAS IMPEACHED BELOW), PETITIONER**

**J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN**

**No. 315**

**JOHN F. MCCARTHY (WITH WHOM THE FEDERAL RESERVE BANK OF NEW YORK WAS IMPEACHED BELOW), PETITIONER**

**J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN**

**No. 324**

**JOHN J. MCCARTHY, AS SHERIFF OF THE CITY OF NEW YORK (WITH WHOM THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, LEO ZITTMAN, AND JOHN F. MCCARTHY WERE IMPEACHED BELOW), AND AS SHERIFF OF THE CITY OF NEW YORK (WITH WHOM THE FEDERAL RESERVE BANK OF NEW YORK, LEO ZITTMAN, AND JOHN F. MCCARTHY WERE IMPEACHED BELOW), PETITIONER**

**J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF FOR THE RESPONDENT**

# INDEX

	Page
Opinions below .....	2
Jurisdiction .....	3
Questions presented .....	3
Statute, Executive Order, and Regulations involved .....	4
Statement .....	4
Summary of argument .....	9
Argument .....	10
I. Executive Order No. 8389 prevented the acquisition, after June 14, 1941, of any proprietary interest in the bank accounts of the German nationals .....	10
A. The terms of the Order .....	10
B. As was held in <i>Propper v. Clark</i> , the prohibitions of the Order extend to attempted transfers by means of judicial process .....	13
C. Petitioners were not licensed or otherwise relieved from the effects of the freezing and vesting programs .....	28
II. The District Court was a proper forum for these proceedings .....	51
Conclusion .....	54

## CITATIONS

### Cases:

<i>Bowen v. Port Huron Engine &amp; Thresher Co.</i> , 109 Ia. 255, 80 N. W. 345 .....	47
<i>Central Union Trust Co. v. Garvan</i> , 254 U. S. 554 .....	14
<i>Commercial Trust Co. v. Miller</i> , 262 U. S. 51 .....	14
<i>Commission for Polish Relief, Ltd. v. Banca Nationala a Rumaniei</i> , 288 N. Y. 332, 43 N. E. 2d 345-36, 39, 40, 42, 49, 50 .....	49, 50
<i>Continental Trust Co. v. Shunk Plow Co.</i> , 263 Fed. 873, certiorari denied; 253 U. S. 488 .....	45
<i>Cramer v. Phoenix Mutual Life Ins. Co.</i> , 91 F. 2d 141, certiorari denied; 302 U. S. 739 .....	47
<i>Disconto Gesellschaft v. Umbreit</i> , 127 Wis. 651, 106 N. W. 821, affirmed, on other grounds, 208 U. S. 570 .....	46
<i>Dyerschuck v. Mellon</i> , 55 F. 2d 741 .....	45
<i>Feuchtwanger v. Central Hanover Bank and Trust Co., et al.</i> , 288 N. Y. 342, 43 N. E. 2d 434 .....	45
<i>Ex Parte Foster</i> , 9 Fed. Cas. 508 .....	47
<i>Jellenik v. Huron Copper Mining Co.</i> , 177 U. S. 1 .....	45
<i>Lyon v. Singer</i> , 330 U. S. 841 .....	9, 24
<i>Markham v. Allen</i> , 326 U. S. 490 .....	52
<i>In re Marsters</i> , 101 F. 2d 365, certiorari denied, 306 U. S. 663 .....	47
<i>Matsuda v. Noble</i> , 200 P. 2d 962 .....	47
<i>McGrath v. Manufacturers Trust Co.</i> , 338 U. S. 241 .....	14
<i>Murphy v. I. G. Farbenindustrie A. G.</i> , Sup. Ct., N. Y. County, Index No. 11346/1941 .....	23

## II

### Cases—Continued

Page

<i>Murray Oil Products Co. v. Mitsui &amp; Co. Ltd.</i> , 55 F. Supp. 353, affirmed, 146 F. 2d 381.....	39
<i>Newberry v. Meadows Fertilizer Co.</i> , 203 N. C. 330, 166 S. E. 79.....	47
<i>Pennington v. Fourth National Bank</i> , 243 U. S. 269.....	44
<i>Pennoyer v. Neff</i> , 95 U. S. 714.....	43
<i>Pennsylvania Co. v. United Railways</i> , 26 F. Supp. 379.....	47
<i>Pilger v. Sutherland</i> , 57 F. 2d 604.....	45
<i>Propper v. Clark</i> , 337 U. S. 472, affirming 169 F. 2d 324.....	8, 9, 10, 12, 13, 14, 15, 16, 17, 20, 21, 24, 26, 27, 29, 32, 39, 52, 53
<i>Sanders v. Armour Fertilizer Works</i> , 292 U. S. 190.....	46
<i>Securities Savings Bank v. California</i> , 263 U. S. 282.....	44, 45
<i>Silesian-American Corp. v. Clark</i> , 332 U. S. 469.....	14
<i>Singer v. Yokohama Specie Bank</i> , 299 N. Y. 113, 85 N. E. 894, affirmed, sub nom. <i>Lyon v. Singer</i> , 339 U. S. 841.....	8, 25
<i>Spokane &amp; Inland R. R. v. United States</i> , 241 U. S. 344.....	30
<i>Sun Insurance Office, Ltd. v. Arauca Fund</i> , 84 F. Supp. 516.....	39
<i>Tyler v. Judges of the Court of Registration</i> , 175 Mass. 71, 55 N. E. 812.....	44, 45
<i>United States v. Pink</i> , 315 U. S. 203.....	23
<i>United States v. Security Trust and Savings Bank</i> , 340 U. S. 47.....	47
<i>In re Yokohama Specie Bank, Ltd.</i> , 188 Misc. 137, 66 N. Y. S. 2d 289.....	13
<i>Yu Cong Eng v. Trinidad</i> , 271 U. S. 500.....	30
<b>Statutes and Treaties:</b>	
First War Powers Act, 1941, 55 Stat. 839, § 301.....	10, 56
Joint Resolution of May 7, 1940, 54 Stat. 179.....	10, 21, 55
New York Banking Law:	
§ 606 (4).....	24
New York Civil Practice Act:	
§ 232 (6).....	45
Paris Agreement on Reparations from Germany, January 24, 1946, 61 Stat. 3157.....	19
Trading With the Enemy Act, 40 Stat. 411, 50 U. S. C. § 1 et seq.:	
§ 5 (b).....	5, 7, 10, 56
§ 9 (a).....	14
§ 17.....	5, 52, 57
§ 34.....	21
§ 34 (a).....	22, 58
§ 34 (b).....	59
§ 34 (c).....	60
§ 34 (d).....	60
§ 34 (e).....	61
§ 34 (f).....	22, 62
§ 34 (g).....	22, 63
§ 34 (h).....	64
§ 34 (i).....	64

# III

## Statutes and Treaties—Continued

### United States Judicial Code:

28 U. S. C. § 1655..... 45

War Claims Act of 1948, 62 Stat. 1240..... 19-20

### Miscellaneous:

*Annual Report of the Secretary of the Treasury, 1941*..... 35

*Annual Report of the Secretary of the Treasury, 1942*..... 35

Berger and Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Col. L. Rev. 398 (1947)..... 36

Code of Federal Regulations, 1949 ed., Title 8, c. II, § 511..... 31

### Congressional Record:

86: 5006-08..... 18, 21

86: 5168-83..... 18

*Drake on Attachment*, 7th Ed., 1891, Sec. 450..... 46

### Executive Orders:

No. 8389, 5 F. R. 1400..... 7, 9, 10, 22, 26, 33, 65

Section 1..... 11, 65

Section 1A..... 11, 12, 66

Section 1B..... 11, 66

Section 1C..... 66

Section 1D..... 66

Section 1E..... 11, 12, 17, 66

Section 1F..... 11, 17, 66

Section 3..... 66

Section 5E..... 67

Section 5F..... 12, 67

Section 7..... 68

No. 8785, 6 F. R. 2897..... 7, 11, 65

No. 9193, 7 F. R. 5205..... 5

No. 9788, 11 F. R. 11981..... 4

General Ruling No. 12, United States Treasury Department, 7 F. R. 2991..... 31, 32, 33, 36, 50, 68

H. Rep. 1507, 77th Cong., 1st Sess..... 18

H. Rep. 2398, 79th Cong., 2d Sess..... 23

Public Circular No. 31, United States Treasury Department, 11 F. R. 8351..... 37, 51, 72

Reeves, *Control of Foreign Funds by the United States Treasury*, 11 Law and Contemporary Problems 17 (1945)..... 20, 36

Reeves, *Policies of the United States Treasury as Applied to Blocked Funds in Litigation*, 113 N. Y. L. J. 2180 (1945)..... 36

S. Rep. 911, 77th Cong., 1st Sess..... 18

S. Rep. 1839, 79th Cong., 2d Sess., p. 5..... 23

*The Requirement of Seizure in the Exercise of Quasi in Rem Jurisdiction: Pennoyer v. Neff Re-examined*, 63 Harv. L. Rev. 657 (1950)..... 44, 48

*United States Treasury Department, Documents Pertaining to Foreign Funds Control* (1946), Press Release No. 34, April 21, 1942..... 32, 34, 75

Vesting Order No. 2097, 8 F. R. 16463..... 27

# **In the Supreme Court of the United States**

**OCTOBER TERM, 1950**

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**No. 298**

**LEO ZITTMAN (WITH WHOM THE CHASE NATIONAL  
BANK OF THE CITY OF NEW YORK WAS IM-  
PLEADED BELOW), PETITIONER**

**v.**

**J. HOWARD McGRATH, ATTORNEY GENERAL, AS  
SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN**

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**No. 299**

**LEO ZITTMAN (WITH WHOM THE FEDERAL RESERVE  
BANK OF NEW YORK WAS IMPEADED BELOW);  
PETITIONER**

**v.**

**J. HOWARD McGRATH, ATTORNEY GENERAL, AS  
SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN**

---

**No. 314**

**JOHN F. MCCARTHY (WITH WHOM THE CHASE  
NATIONAL BANK OF THE CITY OF NEW YORK  
WAS IMPEADED BELOW), PETITIONER**

**v.**

**J. HOWARD McGRATH, ATTORNEY GENERAL, AS  
SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN**

**(1)**

No. 315

JOHN F. MCCARTHY (WITH WHOM THE FEDERAL  
RESERVE BANK OF NEW YORK WAS IMPEADED  
BELOW), PETITIONER

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS  
SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

No. 324

JOHN J. MCCLOSKEY, AS SHERIFF OF THE CITY OF  
NEW YORK (WITH WHOM THE CHASE NATIONAL  
BANK OF THE CITY OF NEW YORK, LEO ZITTMAN,  
AND JOHN F. MCCARTHY WERE IMPEADED BE-  
LOW), AND AS SHERIFF OF THE CITY OF NEW YORK  
(WITH WHOM THE FEDERAL RESERVE BANK OF  
NEW YORK, LEO ZITTMAN, AND JOHN F. MCCAR-  
THY WERE IMPEADED BELOW), PETITIONER

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS  
SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

### BRIEF FOR THE RESPONDENT

#### OPINIONS BELOW

The opinion of the District Court for the  
Southern District of New York (R. 71), is re-  
ported at 82 F. Supp. 740. The *per curiam* opin-  
ion of the Court of Appeals for the Second Circuit  
(R. 150) is reported at 182 F. 2d 349.

**JURISDICTION**

The judgments of the Court of Appeals were entered on June 2, 1950 (R. 151-152). Petitions for rehearing were denied on June 27, 1950 (R. 153). Petitions for writs of certiorari were filed on September 9 (Nos. 298, 299), September 19 (Nos. 314, 315), and September 20, 1950 (No. 324), and were granted on November 13, 1950 (R. 155-157). The jurisdiction of this Court rests on 28 U. S. C. 1254.

**QUESTIONS PRESENTED**

These proceedings were instituted by the respondent to obtain a declaration that he is entitled, under vesting orders issued by the Alien Property Custodian, to the entire balances remaining in certain accounts maintained by two German nationals with two New York banks. Respondent also sought a declaration that federal foreign funds control or "freezing" regulations had prevented two attaching creditors and the sheriff from obtaining liens upon, or other property interests in, the accounts by means of writs of attachment obtained in the courts of New York subsequent to the freeze date but prior to the vesting. The following questions are presented:

1. Whether the court below erred in holding that, absent a license, no interest in blocked property could pass under a post-freezing attachment.
2. Whether the court below erred in holding that the Secretary of the Treasury did not in

fact grant a general license authorizing the acquisition of interests in blocked property by means of attachments.

3. Whether the court below erred in holding that the federal court was a proper forum for determining respondent's rights under the vesting orders issued by the Alien Property Custodian.<sup>1</sup>

#### STATUTE, EXECUTIVE ORDER, AND REGULATIONS INVOLVED

The pertinent provisions of the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. § 1 *et seq.*, and orders and regulations issued thereunder are set forth in the Appendix, *infra*, pp. 55-82.

#### STATEMENT

Respondent, successor to the Alien Property Custodian,<sup>2</sup> instituted two actions in the United

<sup>1</sup> In addition to the above, which are presented in all five cases, a further question is presented in Nos. 299 and 315, and as to part of the amount involved in No. 324, namely: Whether the Custodian is, in any event, entitled to summary possession of the amount demanded in his turnover directive. Because the court below did not reach this question, and we do not believe it will be necessary for this Court to reach it, we shall discuss it only summarily herein. See p. 13, n. 9, *infra*.

<sup>2</sup> By Executive Order No. 9788 (October 14, 1946, 11 F. R. 11981) the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief, the terms "Alien Property Custodian" or "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

States District Court for the Southern District of New York. Both were brought pursuant to Section 17 of the Trading With the Enemy Act and the Federal Declaratory Judgment Act. One was filed against the Chase National Bank of the City of New York and petitioners Zittman, McCarthy and McCloskey (R. 2); the other against the Federal Reserve Bank of New York and the same three petitioners (R. 82). The facts upon which the cases were submitted appear from the pleadings (R. 2-62, 82-132), as supplemented by stipulations between the parties (R. 62-70, 133-139).

By vesting orders executed in October 1946 the Custodian vested the obligations arising out of certain dollar accounts maintained by the Deutsche Reichsbank and the Deutsche Golddiskontbank with the Chase and Federal Reserve Banks in New York, including all rights to demand, enforce and collect the same<sup>1</sup> (R. 9, 14, 88). The vesting order addressed to the obligations of the Federal Reserve Bank was implemented, the same month, by a turnover directive which found that the principal amount of \$1,003,382.78 constituted "property that was vested \* \* \* by the said vesting order" and demanded that this sum, together with all accumulations thereon, be surrendered forthwith to

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<sup>1</sup> The Custodian's vesting authority rests upon Section 5 (b) of the Trading With the Enemy Act and Executive Order No. 9193 (July 6, 1942, 7 F. R. 5205).

the Custodian (R. 93-95). No turnover directive was addressed to Chase,<sup>4</sup> but the vesting orders pertaining to its obligations were served upon it with a demand for compliance (R. 11, 16).

Federal Reserve complied with the Custodian's turnover directive to the extent of remitting \$703,382.78. It retained \$300,000 in its Reichsbank account, however, on the ground that it was required to do so by writs of attachment which had been served upon it (R. 97-101). Chase declined to surrender any of the property embraced by the Custodian's orders, asserting that it had been served with writs attaching its Reichsbank and Golddiskontbank accounts (R. 18-22). Both banks expressed readiness to comply in full with the Custodian's vesting orders if the writs of attachment which had been served upon them were vacated (R. 20, 22, 61-62, 98).

The writs involved were procured by the petitioners Zittman and McCarthy in actions which they commenced against the Deutsche Reichsbank and the Deutsche Golddiskontbank in the Supreme Court of New York, Kings County, on December 11, 1941, and January 20, 1942 (R. 40, 48, 117, 126). Default judgments were subsequently entered in those actions following service by publication (R. 42, 50, 117, 127-128). More than six months prior to the commencement of those actions all German-owned property located in this

<sup>4</sup> This is the only particular in which there is a significant difference between the two cases.

country had been frozen (Section 5 (b) of the Trading With the Enemy Act; Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order No. 8785, June 14, 1941, 6 F. R. 2897). Petitioners never obtained a license from the Treasury authorizing them to acquire interests in the bank accounts in question or to satisfy their judgments out of them (R. 5, 8-9, 39, 47, 84-85, 87-88, 118, 125).<sup>5</sup> Accordingly, there has been no execution on the judgments (R. 5, 39, 47, 85, 118, 125).

It was stipulated by the parties that the Treasury Department, in administering the freezing controls, advised persons who made inquiry concerning the possibility of securing adjudication of their rights *vis-a-vis* owners of blocked property, that the regulations did not in any way forbid the bringing of suits in the courts or the resort to judicial process (including writs of attachment), but that a license was required before a judgment obtained in any suit could be satisfied out of blocked property. It was also stipulated that on various occasions the Treasury Department has specifically licensed payments from blocked accounts in satisfaction of judgments obtained against blocked nationals in suits instituted by attachment (R. 62-70, 133-139).

Petitioners Zittman and McCarthy contested respondent's claim that he is entitled to the

<sup>5</sup> Petitioner McCarthy filed applications for licenses which were denied (R. 9, 40, 87-88, 118).

money held in the accounts, on the ground that their attachments gave them antecedent property rights in those accounts superior to those which the Custodian took under his vesting orders (R. 44, 52, 122, 129). Petitioner McCloskey adopted these contentions and also urged that, if the court should find respondent entitled to the property in issue, it should nonetheless provide for payment to him of poundage fees (R. 55, 132).

The District Court held that all German-owned property having a situs in this country was effectively frozen on June 14, 1941; that "judicial process cannot, without a license or other authorization from the Secretary [of the Treasury], create any interest in blocked property"; and that no such authorization was in fact granted. It also held that the sheriff's claim for poundage necessarily fails because no interest in the blocked property passed under the attachments. It accordingly declared respondent entitled to the entire balances remaining in the vested accounts (R. 71-75).

The Court of Appeals affirmed as to petitioners Zittman and McCarthy on the authority of *Propper v. Clark*, 337 U. S. 472, and as to petitioner McCloskey on the ground stated by the District Judge (R. 151). After decision by this Court in the case of *Lyon v. Singer*, 339 U. S. 841, petitioners applied for a rehearing. Their applications were denied (R. 153).

## SUMMARY OF ARGUMENT

Effective June 14, 1941, transfers of interests in the German bank accounts maintained with Chase and Federal Reserve were prohibited (except as licensed) by the express terms of the freeze order, Executive Order No. 8389. Petitioners could not thereafter acquire a property interest in the blocked accounts which could prevail against a subsequent vesting by the Custodian. That was the holding of this Court in *Propper v. Clark*, 337 U. S. 472, where the creditor of a blocked national proceeded by securing a state court appointment of a permanent receiver. The logic of that decision required the holding below that these petitioners, also creditors, could no more prevail where they proceeded by the parallel avenue of attachment. Nothing in this Court's decision in *Lyon v. Singer*, 339 U. S. 841, purports to qualify or limit the *Propper* decision. On the contrary this Court affirmed the decision of the New York court in *Singer* only because it did not construe that decision as impairing "the Custodian's paramount power to vest" (339 U. S. at 843).

The *Propper* case also established that certain general rulings and regulations of the federal authorities, declaring that parties were free to seek adjudication of their rights *vis-a-vis* blocked nationals, could not be regarded as authorizing the courts to effect unlicensed transfers of blocked

property. The Treasury position on proceedings by attachment was the same: that they were not as such prohibited, but that any transfer of a proprietary interest pursuant to such a proceeding was conditional upon a license releasing the property from the federally-imposed freeze. Petitioners' contention that certain informal communications by the Secretary of the Treasury amounted to a general license authorizing the acquisition of rights *in rem* by unlicensed attachment is groundless. No license was issued petitioners and none may be inferred.

*Propper*<sup>3</sup> is likewise decisive on the proposition that the federal courts have jurisdiction to declare the Custodian's rights under a vesting order, irrespective of the fact that a state court has previously entertained creditor's proceedings against the blocked national who then owned the property involved.

#### ARGUMENT

#### I. EXECUTIVE ORDER NO. 8389 PREVENTED THE ACQUISITION, AFTER JUNE 14, 1941, OF ANY PROPRIETARY INTEREST IN THE BANK ACCOUNTS OF THE GERMAN NATIONALS

##### A. THE TERMS OF THE ORDER

Executive Order No. 8389, as amended,<sup>6</sup> provides:

<sup>6</sup> The President's authority to issue the Order rests upon Section 5 (b) of the Trading With the Enemy Act, as amended by the Joint Resolution of May 7, 1940 (54 Stat. 179), and as further amended by the First War Powers Act of 1941, Section 301 (55 Stat. 839).

SECTION 1. All of the following transactions are *prohibited*, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise if \* \* \* such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States \* \* \*;

B. All payments by or to any banking institution within the United States; . . .

E. All *transfers*, withdrawals, or exportations of, or *dealings in*, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions. [*Italics added.*]

The Order became effective as to German property in this country as of June 14, 1941 (Executive Order No. 8785, 6 F. R. 2897). Petitioners recognize that they cannot be paid out of the blocked accounts without a license; they nonethe-

There is no dispute that the Reichsbank and the Gold-diskontbank are banks organized under the laws of Germany and are nationals within the ambit of the Order.

less contend that they were free to acquire, by means of their unlicensed attachments, an interest in the blocked property and, *pro tanto*, to defeat the possibility of its seizure by the Custodian as enemy property. Section 1E of the Order makes it plain, however, that its prohibitions were directed not merely against payments out of blocked funds but against any transfer of interest in blocked property. The proscription is against "all transfers, \* \* \* of, or dealings in, any evidences of indebtedness or evidences of ownership of property." Whether the blocked accounts here involved be considered as trust funds for the benefit of the Reichsbank and the Golddiskontbank or whether only the usual debtor-creditor relationship was created by the deposits, it is plain that the accounts fall within the description "evidences of indebtedness or evidences of ownership of property." Any attempts, therefore, by the petitioners to acquire an interest in the accounts by the writs of attachment necessarily constituted acts of "transfer" or "dealing in" such evidences of indebtedness or ownership and required a license.\*

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\* Subparagraph A prohibiting "transfers of credit between \* \* \* banking institutions" is also applicable. Since "banking institution" is defined in Section 5F of the Order as including "any person holding credits for others as a direct or incidental part of his business" (App. p. 67), it comprehends the sheriff as well as the Chase and Federal Reserve Banks. Cf. *Propper v. Clark*, 337 U. S. at pp. 480-482.

B. AS WAS HELD IN *PROPPER v. CLARK*, THE PROHIBITIONS OF THE ORDER EXTEND TO ATTEMPTED TRANSFERS BY MEANS OF JUDICIAL PROCESS

Petitioners stress that nothing in the Trading With the Enemy Act or in the freezing regulations prohibits the bringing of suits against enemy nationals in time of war. This is correct. Indeed, the Treasury Department in administering the controls took the position from the outset that parties were free to seek adjudications of their rights *vis-a-vis* blocked nationals. This does not alter the fact, however, that transfers of interests in property subject to the controls may not be effected without a license and that it is immaterial whether the attempted transfer is by voluntary assignment or by means of judicial process. That the prohibitions go to both categories of transfers was squarely decided by this Court in *Propper v. Clark*, *supra*. The courts below were clearly correct in holding that decision dispositive of the present litigation.\*

\* We believe that there is an additional ground, not discussed by the court below, for upholding the respondent's position in the cases involving the Federal Reserve accounts (Nos. 299, 315, and part of No. 324). Since the Act does not specify that the Custodian's findings must take a particular form, the turnover directive addressed to Federal Reserve, finding that a specific sum was enemy property, must be read in conjunction with the vesting order in determining what the Custodian proposed to seize. *In re Yokohama Specie Bank, Ltd.*, 188 Misc. 137, 141, 66 N. Y. S. 2d 289, 293. So read, it is apparent that the Custodian did not vest an indeterminate interest in the Federal Reserve accounts, leaving open for judicial determination the *quantum* of that interest,

In *Propper*, the Custodian sought a declaration that he was entitled under a vesting order to funds held by an American Society (ASCAP) for an Austrian national. He also sought a declaration that a permanent receiver appointed subsequent to freezing by a New York court pursuant to a New York judgment, for the purpose of receiving and reducing to possession the local assets of the Austrian national, acquired no interest in the blocked property held by ASCAP, in the absence of a federal license. It was conceded that, had there been no freezing controls in effect, the permanent receiver would have taken title to the property.

The parallel between *Propper* and the instant cases is obvious. In both, New York claimants,

but rather vested a specific *res*. Where he vests a described *res*, the Custodian is clearly entitled to immediate possession (*Silesian-American Corp. v. Clark*, 332 U. S. 469; *Commercial Trust Co. v. Miller*, 262 U. S. 51; *Central Union Trust Co. v. Garvan*, 254 U. S. 554). This rule applies even though the *res* which is vested is regarded merely as a debt owing to an enemy, at least where, as here (*supra* p. 56), the debtor does not dispute the existence and amount of the debt. *McGrath v. Manufacturers Trust Co.*, 338 U. S. 241. The only remedy of a non-enemy claiming an interest in the property is by suit under Section 9 (a) (*ibid.*).

Since the court below determined that these petitioners could not have acquired any interest in either the Chase or Federal Reserve accounts because of the impact of freezing, it did not find it necessary to consider the difference between the character of the vestings in the two cases. Similarly, it will be necessary for this Court to consider that question only if it should conclude that the court below erred as to the Chase accounts.

proceeding under New York law, sought to realize on the local assets of enemy nationals. In both, they availed themselves of provisional remedies and obtained default judgments in proceedings grounded on substituted service. In both, they contended that New York's judicial process had given them an interest in the property itself which prevented the Custodian from taking it under a vesting order. And in both, the process upon which they relied had been issued after the freeze date and without a federal license. In *Propper*, as here, it was contended by the petitioner that the freezing prohibitions did not prevent transfer of an interest in the property, but only purported to screen *payments* by means of a licensing system. This argument was flatly rejected by the Court of Appeals for the Second Circuit, which stated [169 F. 2d 324, 327]:

The language of Exec. Order 8389 prohibits the unlicensed transfer of an enemy alien's property. There is no cogent reason for excepting transfers by judicial process. To allow the exception would be to furnish a means of evasion by which the impact of freezing controls could be avoided by recourse to judicial proceedings. Such would negate the executive and legislative intention.

Affirming that decision, this Court declared [337 U. S. at pp. 480, 486]:

The Executive Order of June 14, 1941  
\* \* \* specified the prohibited transac-

tions \* \* \* by categories so all-inclusive as to make it clear that the purpose was to require transactions involving property of nationals of designated foreign countries to be carried out under regulations of this Government, except certain transactions such as are provided for in General Ruling No. 12, April 21, 1942, 7 Fed. Reg. 2991. \* \* \*

\* \* \* \* \*

It is our conclusion that the Joint Resolution of May 7, 1940, and the Executive Order of April 10, 1940, put into effect a valid plan for control of the property covered by the regulation that prohibited any change of title to that property by reason of the subsequent appointment of petitioner as permanent receiver. We do not now undertake to say whether every determination of rights concerning blocked property in unlicensed litigation is voidable. We base our determination on the purpose of Congress to prevent shifts in title to blocked assets and the prohibition of the Executive Order against transfers of such a credit as this. The language of the order prohibits more than payment. It prohibits transfers of credit: \* \* \*

It is argued that *Propper* is distinguishable because the issue there was whether the receiver took title, whereas the issue here is whether petitioners acquired fixed liens on the blocked property. The attempted distinction is entirely without substance. On the face of it, it is little short

of absurd to suggest that, while creditors of an enemy national are precluded from reaching his blocked property in the absence of a license where they proceed by the provisional remedy of receivership, the opposite result will be permitted where they follow the provisional remedy of attachment. Certainly there is nothing in the language of the freeze order, in the purposes of the controls, or in the rationale of the *Propper* decision that would countenance such a paradoxical result.

As emphasized above, the freeze order "prohibits more than payment"; it prohibits all unlicensed "transfers \* \* \* or dealings in" blocked property (§ 1E), and "any transaction \* \* \* which has the effect of evading or avoiding the foregoing prohibitions" (§ 1F). To hold that one could transfer valuable rights in blocked property so long as title did not pass—that one could remove the meat so long as the shell remained—would ignore the plain mandate of the Order.

It would also defeat the basic purposes of the controls. A primary objective of freezing was to prevent the Axis countries from drawing sustenance from property within the jurisdiction of the United States (cf. *Propper v. Clark, supra* at p. 481). It was recognized that if only payments out of blocked property were proscribed it would be a simple matter for the aggressor nations to sell interests in blocked property (either those of

their own nationals or those owned by nationals of the invaded countries) to friendly speculators willing to buy at a discount and to await payment on the ultimate day of unblocking. See 86 Cong. Rec. 5006-08, 5168-83; H. Rep. 1507, 77th Cong., 1st Sess., p. 3; S. Rep. 911, 77th Cong., 1st Sess., p. 2.

To hold that *any* interest in blocked property may pass without a license would be destructive of this aim. The possibility of assigning interests by attachments furnishes one illustration. Suppose the case of a German national who had a million dollars in New York at the time the freeze went into effect. If a non-enemy speculator could, without a federal license, acquire an indefeasible lien on that property by the simple expedient of filing a complaint, fictitious or otherwise, procuring a writ of garnishment or attachment, and then obtaining a default or confessed judgment, can it be doubted that he might be willing to pay the German handsomely with "free" money for the privilege?<sup>10</sup> Yet, that was the very kind of transaction freezing was designed to make unprofitable.<sup>11</sup>

<sup>10</sup> This illustration is designed to show the dangers to the freezing program implicit in petitioners' theory. No implication is intended that there was any impropriety in connection with the actions which these petitioners brought against the Reichsbank and the Golddiskontbank.

<sup>11</sup> Another illustration of the evils to which petitioners' theory leads is provided by the case of a pledge. Suppose that a German national owned General Motors stock when freezing went into effect. Petitioners would agree that he

A second, closely related, objective of the program was to preserve blocked enemy property for possible future vesting and for such disposition as might ultimately be decided upon. The policies to be adopted by the United States with respect to the disposition of enemy property were not determined until some years after our entry into the war. The first step in fixing those policies was made in the Paris Agreement on Reparations from Germany, effective January 24, 1946, 61 Stat. 3157, to which the United States and seventeen other nations are signatories. Article 6A provides that each signatory shall hold or dispose of German enemy assets within its jurisdiction so as to preclude their return to German ownership or control, and shall charge such assets against its share of reparations from Germany. Thereafter, in the War Claims Act of 1948, 62 Stat. 1240, Congress provided that German and Japanese property vested by the American Custodian shall not be returned to its former owners (§ 12), and that the proceeds of such property remaining after administration under the Trading With the Enemy Act shall be covered into a

could not thereafter divest himself of title. But apparently they would say that he could hypothecate or pledge the stock to a neutral as security for a loan, and at one stroke obtain an economic benefit and insulate the property from this country's vesting power. To hold, in the face of a prohibition against "all transfers \* \* \* or dealings in" blocked property, that such a transaction could create an indefeasible interest in the pledgee would be unthinkable.

War Claims Fund (§§ 12, 13 (a)), to be used to provide compensation to American victims of Axis aggression (§§ 4-8). Pending these determinations, it was plainly necessary to immobilize all enemy property to insure that whatever policies might ultimately be adopted could be applied to it. See Reeves, *Control of Foreign Funds by the United States Treasury*, 11 Law and Contemporary Problems 17, 29-30 (1945). Obviously, to permit non-enemies, without a federal license, to acquire indefeasible rights of any kind in enemy property would, *pro tanto*, destroy its subsequent availability to our Government as reparations and to those war claimants for whom Congress sought to provide compensation.

Accordingly, this Court, in *Propper v. Clark*, *supra*, at p. 484, recognized that a major purpose of the freezing program was to keep enemy property intact "until the Government could determine whether those assets were needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damages done by the governments of the nationals affected." Petitioners state that in *Propper* the Court was addressing itself only to transfers of title. It is true that that was the kind of transfer there presented: It can scarcely be supposed, however, that transfers of lesser property interests stand on any different footing. Indeed the Court spoke, more generally, of "transfers of credit" as prohibited (p. 486). It is unmistakably plain that

to allow the creation of an indefeasible lien on blocked property would frustrate *pro tanto* the purpose of preserving it for possible future vesting and ultimate disposition in accordance with the policy of Congress just as effectively as would an unauthorized assignment of title. This case proves the point. These petitioners are seeking to resist the claim of the Custodian to take property that was admittedly enemy-owned on June 14, 1941, and they rely solely on liens which they claim to have acquired subsequent to that date and which they assert to be indefeasible.

Still another purpose in preventing unlicensed transfers of enemy property was the protection of *all* United States citizens having claims against enemy nationals. The importance of this aspect of freezing was stressed in 1940 when Congress, by a Joint Resolution,<sup>12</sup> first ratified the freeze order. See remarks of Senator Barkley, 86 Cong. Rec. 5006. And it was emphasized by this Court in *Propper* that a primary purpose in immobilizing enemy property was to hold it available for future compensation of "our citizens or ourselves" (337 U. S. at p. 484).

This objective was carefully implemented in 1946 by the addition to the Trading With the Enemy Act of Section 34, which establishes a complete scheme for the satisfaction of American nationals to whom the former owners of vested

<sup>12</sup> Joint Resolution of May 7, 1940, 54 Stat. 179.

property were indebted. That Section provides that vested property held by the Custodian shall be "equitably applied" to debts owed by the pre-vesting owner to American citizens or residents (§ 34 (a)). It further declares that no debt claim is to be allowed "if it arose from any action or transaction prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto \* \* \*." In cases where the aggregate of valid debt claims against a particular debtor exceeds his vested assets, the Custodian is directed to make a *pro rata* allocation (§ 34 (f)). While the Section provides for certain priorities (§ 34 (g)), *e. g.*, wage and salary claims, it grants none to persons who obtained unlicensed writs of attachment against the property later vested. To interpret Executive Order No. 8389, therefore, as permitting a transfer of property to one creditor by unlicensed attachment or judgment would be a manifest contradiction of the fixed intent of Congress to treat all creditors alike.<sup>13</sup>

It should also be stressed that the remedies under Section 34 are available only to American nationals. That foreign creditors should "ad-

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<sup>13</sup> Absent special equities, the consistent policy of the Custodian has been to deny licenses to individual creditors of *enemy* debtors and to process the claims of all in accordance with the procedures established by Congress in Section 34. In cases involving *friendly* alien debtors whose property was blocked for preventive reasons, *i. e.*, to forestall looting and forced transfers abroad, licenses to established creditors have generally been granted.

dress themselves to [enemy] property" located in their own countries was the carefully considered decision of the Congress. S. Rep. No. 1839, 79th Cong., 2d Sess., p. 5; H. Rep. No. 2398, 79th Cong., 2d Sess., p. 11." But, if petitioners' thesis is accepted, numerous foreign creditors of German and Japanese nationals will be in a position to deplete the funds which Congress provided should be used exclusively for American creditors and American war claimants. Foreign creditors have followed the same course as did petitioners Zittman and McCarthy. Coming into American state courts, either directly or through assignees for the purpose of suit, they have secured the issuance of writs of attachment directed against blocked property located in this country. Thus, in the case of *Murphy v. I. G. Farbenindustrie A. G.* (Sup. Ct., N. Y. County, Index No. 11346/1941) the representative of an English creditor of the defendant German company attached some \$294,000 of blocked Farben funds located in New York and thereupon obtained a default judgment. These Farben assets were later vested by the Custodian on behalf of the United States. Plaintiff was denied a license, but, like these petitioners, he persists in the con-

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<sup>11</sup> Cf. *United States v. Pink*, 315 U. S. 203, 228:

"There is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts."

tention that by his attachment he acquired rights superior to the Custodian's. Other foreign creditors make the same claim. The answer, as this Court stated in *Propper*, is that freezing was plainly designed to hold all transfers in abeyance until they could be scrutinized in the light of national policy as ultimately determined and declared by the Congress and the Executive.

Apparently recognizing that there is no real escape from the logic of the *Propper* decision, petitioners argue that the court below erred in choosing *Propper v. Clark* as its guide instead of the decision in *Lynn v. Singer*, 339 U. S. 841. As this Court explicitly pointed out, however, in its opinion in *Singer*, there is no disparity in the results reached in those two cases. Indeed, it was only because this Court found the New York Court of Appeals' holding in *Singer* consistent with *Propper* and with the purposes of the freezing and vesting programs that it affirmed the judgment in that case.

The question raised by *Singer* was whether a plaintiff was entitled under Section 606 (4) of the New York Banking Law to status as a preferred creditor with respect to the assets of a Japanese corporation held by the New York Superintendent of Banks as a statutory liquidator. To establish preferred status under the Banking Law plaintiff had to show that his claim arose out of a transaction with the New York agency of the Japanese corporation. The New

York Court of Appeals found that he had made the requisite showing although the pertinent transaction had taken place after freezing and had not been licensed. On the freezing issue the court stated that "a survey of the underlying facts leaves no doubt that plaintiff's claim rests upon a transaction which was subject to the licensing requirements" (299 N. Y. 113, 118, 85 N. E. 2d 894, 895), observing further that "the consistent design of [the freezing] program is to prevent the fruits of prohibited transactions from being harvested until the underlying dealings are screened and found to be consonant with the national interests" (299 N. Y. at p. 125, 85 N. E. 2d at p. 899). The court concluded that plaintiff had preferred status as a matter of New York law but held that payment to him was "conditional upon his obtaining a Treasury license" (299 N. Y. at p. 120, 85 N. E. 2d at p. 896). Because this Court affirmed the New York decision, petitioners here would argue that indefeasible interests in blocked property may be created by post-freezing transactions and that only payment is interdicted.

This position is absolutely untenable in the face of this Court's opinion in *Singer*. This Court construed the opinion of the New York Court of Appeals as holding that under New York law "the transactions gave rise to a preferred claim in the liquidation, but that payment by the liquidator must await specific licensing by the

Alien Property Custodian of the *transactions underlying the claims.*" [Emphasis added.]<sup>15</sup> The opinion thus unmistakably affirms the principle that a post-freezing act cannot operate to transfer interests in blocked property unless and until a license is granted. This is underscored by the language of the opinion which followed (339 U. S. at 842-843):

Since the New York court conditioned enforcement of the claims upon licensing by the Alien Property Custodian, federal control over alien property remains undiminished. Our decision in *Propper v. Clark*, 337 U. S. 472, does not require a contrary conclusion. There the liquidator claimed title to frozen assets adversely to the Custodian, and sought to deny the Custodian's paramount power to vest the alien property in the United States. No such result follows from the New York court's judgments in the present cases.

The result which this Court stated did *not* follow from the *Singer* decision is the one which petitioners are urging here. They claim "adversely to the Custodian", seeking to deny, on the basis of post-freezing transactions, that the Custodian is entitled to take enemy property

<sup>15</sup>In the instant case, "the transactions underlying the claims" are the post-freezing attachments. It is to be emphasized that the petitioners are here claiming *in rem* rights, and that claim alone is in dispute. Their right to assert debt claims against the vested assets under Section 34 of the Act is not in issue here.

which had been frozen by previous order of the President. Their very purpose in this litigation is to resist the effective assertion of "federal control over alien property."

Petitioners also state that the Custodian did not vest the *res* in the instant cases (which is true so far as the Chase accounts are concerned<sup>16</sup>) and argue that the vesting power is, therefore, not in issue. It is true that where the Custodian vests the enemy interest in designated property and leaves open for judicial determination the existence of any adverse interest in that property (which is the exact course that was followed in *Propper*<sup>17</sup>), the power to take immediate possession by summary seizure is not in issue. But there is no question that in a proceeding brought to enforce an "interest" vesting, the Custodian is entitled to take the total enemy interest as determined by the court. As held in *Propper*, that means the total enemy interest as it existed on the date of freezing, save to the extent that subsequent transfers were licensed. The reach of the Custodian's vesting is in issue here in exactly the same way as it was in *Propper*. And to accord him anything less than the total enemy in-

<sup>16</sup> With reference to the Federal Reserve accounts, see note 9, *supra*.

<sup>17</sup> The vesting order involved in *Propper* (No. 2097; 8 F. R. 16463) was of the "right, title and interest" variety. And the Custodian there sought a declaration from the court that the receiver had no "right, title or interest in the claim in question," 337 U. S. at p. 475.

terest as it stood on the freeze date would, in the words of this Court, "deny the \* \* \* paramount power to vest \* \* \* alien property in the United States."

**C. PETITIONERS WERE NOT LICENSED OR OTHERWISE RELIEVED FROM THE EFFECTS OF THE FREEZING AND VESTING PROGRAMS**

Petitioners make the additional contention that, whatever the scope of the Executive Order, the Secretary of the Treasury relieved them from the effect of its prohibitions and authorized the acquisition of the property interests to which they lay claim. They concede that no specific license was granted them but urge that a general authorization is to be inferred. They point to the agreed fact that suits against blocked nationals were not prohibited by the terms of the Trading With the Enemy Act or the freezing regulations issued thereunder. They refer also to respondent's stipulation that prospective litigants who applied for a license prior to commencing an attachment action (petitioners, themselves, made no such application) received a reply of the following nature (R. 66):

Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license

would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.

This, petitioners state, reflects an intention to screen payment, but not to forbid the acquisition of an interest. Apart from the fact that this capsule statement should not be taken as a complete formulation of the Treasury position (which is set out fully in the General Rulings and Regulations discussed *infra*), we take issue with this construction. If the Treasury had been concerned merely with preventing payments to persons within the orbit of Axis control, doubtless it would have assured the license applicant that payment of any judgment he might obtain would be licensed as a matter of course upon a showing that he, himself, was not a blocked national—a matter very readily ascertainable. But the Treasury offered no assurance whatever that a license would be issued to any applicant. It reserved that question. Its concern, as is apparent, was that the existing ownership was alien. Being alien property, its release or other disposition was to be determined in the light of future events and in accordance with evolving national policies. Fairly construed, the letter means that prospective litigants were deemed free to resort to judicial process (as, also, conceded by the Government in *Propper*), but that the property itself

continued subject to overriding federal controls upon "all transfers."

To this it should be added that the letter does not purport to be a release or a license, and that no such letter was in any event sent to any of these petitioners. But having construed it, first, as implying a waiver of the categorical prohibition of the freeze order against "all transfers," petitioners next proceed to the conclusion that it constituted a general authorization to the world at large to acquire indefeasible interests in blocked property by means of securing writs in the state courts. We submit that this attempt to imply a license is utterly unwarranted. Derogations from the prohibitions of a law are not to be implied in the absence of a clear expression of intent to create an exception. *Yu Cong Eng v. Trinidad*, 271 U. S. 500, 518-519; *Spokane & Inland R. R. v. United States*, 241 U. S. 344, 350. We reiterate that the Treasury's only purpose was to inform the prospective litigant that he was not precluded from bringing suit, but that the prospect of harvesting the fruits of litigation depended upon whether the federal authorities ultimately decided to unfreeze the property. If the Treasury had ever intended to authorize generally the acquisition of fixed liens or other indefeasible interests in blocked property (a step which was, in point of fact, irreconcilable with its basic objectives), it presumably would have done so by its usual practice of issuing a General

License and publishing it in the Federal Register and the Code of Federal Regulations.<sup>18</sup> It did no such thing. On the contrary, every public pronouncement which it has issued on the subject proves conclusively that its intention was otherwise.

United States Treasury Department General Ruling No. 12 (April 21, 1942, 7 F. R. 2991), issued "by direction of the President", provides in part:

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of the Order [Executive Order No. 8389] is *null and void* to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer;

\* \* \* \* \*

(5) For the purposes of this general ruling:

(a) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing

<sup>18</sup> Ninety-seven such licenses have been published to date. See Code of Federal Regulations, 1949 ed., Title 8, c. II, § 511.

shall include the \* \* \* *creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution or other judicial or administrative process or order, or the service of any garnishment; \* \* \** [Italics added.]

This Ruling was declaratory of the Order. In the accompanying press release (Press Release No. 34, U. S. Treasury Dept., *Documents Pertaining to Foreign Funds Control* (1946), pp. 71-73, App. pp. 75, 82-83), the Secretary of the Treasury pointed out:

*Unlicensed transfers of blocked assets always have been void and unenforceable under the freezing orders and \* \* \** [General Ruling No. 12] serves the purpose of emphasizing this fact for the benefit of any of the public who may have overlooked this aspect of freezing control. \* \* \* The term "transfer" is given a very comprehensive meaning, excepting only certain types of transfers by operation of law (e. g., transfer by intestate succession). [Italics added.]<sup>10</sup>

<sup>10</sup> While General Ruling No. 12 was published subsequent to the time that the writs of attachment here involved were issued, that Ruling is a statement of the Treasury position as adopted from the inception of freezing. In *Propper*, also, the petitioner's appointment as permanent receiver antedated publication of the Ruling. The Ruling was declared "useful" as a statement of the position taken in the administration of the controls. 337 U. S. at pp. 485-486. It certainly indicates here that Treasury never intended to create the exception which petitioners would infer.

The provisions of paragraph 4 of General Ruling No. 12 did not alter this prohibition against the transfer of interests by attachments, levies, or other judicial process. Paragraph 4 reads:

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

The proviso distinctly states that no judicial process shall confer or create a greater interest in any property in a blocked account than the owner of the property could create or confer by voluntary act without a license. Obviously, under the other provisions of Executive Order No. 8389 and General Ruling No. 12 an attempted voluntary assignment by the Reichsbank or the Golddiskontbank would have been ineffective to pass any interest in the blocked property. In short, while paragraph 4 makes it plain that the Treasury did

not impose an absolute prohibition on litigation relating to blocked property or on the use of such property as a basis for the exercise of jurisdiction over its nonresident owner, it also clearly specifies the limits beyond which the courts might not go. The paragraph is clearly *not* a consent to the acquisition, as the result of judicial action, of any interest in blocked property. It permits judicial action only to the extent that such action is possible without transferring an interest in blocked property, or otherwise effectuating a transaction prohibited by the Order. The press release contemporaneously issued (Press Release No. 34, *supra*) emphasizes the same point:

Paragraph (4) is but a formal statement of the position which the Treasury Department has always taken on litigation (including attachments) affecting blocked assets. The Treasury has no desire to limit the bringing of suits in courts within the United States: *Provided*, That no greater interest is created by virtue of the attachment, judgment, etc., than the owner of the blocked account could have voluntarily conferred without a license. Thus, the Treasury does not want to interfere with the orderly consideration of cases by the courts provided that the results of court proceedings are subject to the same policy consideration from the point of view of freezing control as those arising through voluntary action of the parties.

It may be noted parenthetically that the pressure of wartime business inevitably compelled the Treasury to postpone final action on many license applications. In the fiscal year 1940-1941, 170,000 applications for licenses to engage in designated transactions were filed (*Annual Report of the Secretary of the Treasury, 1941*, p. 219); in 1941-1942, 330,747 (*id.*, 1942, pp. 159-160). The fact, however, that the Treasury was unable in many instances to decide promptly the ultimate licensing question—a decision apt to involve both the sifting of facts and circumstances and determinations of policy—did not foreclose the parties from taking preliminary steps falling short of actual effectuation of the prohibited transaction. For example, an owner of blocked property could not assign it without a license. But freezing did not prevent him from negotiating a contract whereby he would assign it on certain terms and conditions upon the grant of the requisite license. Indeed, frequently, it was only by concluding his negotiations and presenting the plan in detail that he could provide the Treasury with an adequate basis for determining the merits of the application. Similar considerations applied to litigation. A creditor could not seize the blocked property of his alleged debtor without a license. But, as the Treasury advised him, he could, if he chose, seek an adjudication of his rights against the blocked national and take his chances that he

might ultimately be granted a license enabling him to reach the blocked property. By thus proceeding to adjudication, he could secure judicial determination of applicable questions of fact and of state law, thus again affording the Treasury Department a more informed basis for deciding whether the circumstances warranted a release of the property from federal controls. See Reeves, *Control of Foreign Funds*, 11 Law and Contemporary Problems 17, 44-45.<sup>20</sup> That no more was intended by the permission to bring suit was widely understood by the bar. See discussions in Berger and Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Col. L. Rev. 398 (1947)<sup>21</sup>; Reeves, *supra*, 44-49; and Reeves, *Policies of the United States Treasury as Applied to Blocked Funds in Litigation*, 113 N. Y. L. J. 2180, 2200 (1945).

The limited effect of paragraph 4 of General Ruling No. 12 was again reaffirmed in unmis-

<sup>20</sup> The author quotes, at p. 45, the following statement made by the United States in its brief *amicus curiae* in *Commission for Polish Relief, Ltd. v. Banca Nationala a Romaniei*, 288 N. Y. 332, 43 N. E. 2d 345:

“Indeed the Treasury regards the courts as the appropriate place to decide disputed claims and suggested to parties that they adjudicate such claims before applying for a license to permit the transfer of funds. The judgment was then regarded by the Treasury as the *equivalent of a voluntary payment order without the creation or transfer of any vested interest*, and a license was issued or denied on the same principles of policy as those governing voluntary transfers of blocked assets.” (Italics supplied.)

takable terms by the Treasury Department in Public Circular No. 31, issued on August 2, 1946, 11 F. R. 8351:

\* \* \* \* \*

(3) An attachment is a "transfer." See paragraph (5) of General Ruling No. 12, where the term "transfer" is defined as including "the issuance, docketing, filing, or other levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment." *An unlicensed attachment, therefore, cannot operate to transfer or create any interest in blocked property.* Nor can it serve as a basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any blocked property.

(4) Paragraph (4) of General Ruling No. 12 does not constitute a license authorizing the seizure or creation of any interest in blocked property by attachment proceedings or other legal process. This paragraph merely is a formal statement of the position which the Treasury Department has always taken with respect to litigation affecting blocked property—that it does not desire to interfere with such litigation so long as it is clearly understood that the judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property.

Thus the proviso of paragraph (4) specifies that "no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license." *In issuing paragraph (4), the Treasury Department did not undertake to decide for the courts whether they should exercise jurisdiction. It simply prescribed that jurisdiction could be exercised only on the basis that if a Treasury license was not issued, the judicial process could not operate to transfer or create any interest in blocked property, nor could it be the basis for the assertion or recognition of any other right, remedy, power, or privilege with respect to the property. [Italics added.]*

Whether the courts of a particular state will permit jurisdiction over an absent defendant to be founded on such a limited control by its officers of the defendant's property, or whether a court will initially entertain proceedings in which it is powerless to render an unrestricted judgment against blocked funds, are questions which fall outside this case. The only issue here is whether petitioners acquired any proprietary interest in the particular accounts. In the face of Executive Order No. 8389 and General Ruling

No. 12, it is manifest that they could acquire no such interest after June 14, 1941, in the absence of a Treasury license.<sup>21</sup>

Petitioners seek comfort from the fact that in the case of *Commission for Polish Relief, Ltd. v. Banca Nationala a Rumaniei*, 288 N. Y. 332, 43 N. E. 2d 345, the Treasury, appearing as *amicus curiae*, advised the New York Court of

<sup>21</sup> Of the cases cited by petitioners, the only one which supports their contention to the contrary is *Sun Insurance Office, Ltd. v. Arauca Fund*, 84 F. Supp. 516 (S. D. Fla.). The court stated in that case:

"\* \* \* the libelant herein had a valid attachment lien on the vessel by virtue of its attachment of July 12, 1941, notwithstanding the fact that no license authorizing said attachment was secured from the Secretary of the Treasury under the provisions of Executive Order 8389. No license or permit under said Executive Order was required to validate libelant's attachment lien." [Pp. 518-519.]

Nothing on this point appears in the opinion beyond the bare statement quoted above. There is no discussion or analysis whatever of the controls or of their purpose and there is no way of ascertaining how the court arrived at its conclusion. In the face of the language of the Order and the regulations, and this Court's definitive decision in *Propper*, the conclusion is believed untenable. The decision in *Sun Insurance* was not appealed by the Custodian because the court held on other grounds that the libelant was not entitled to a recovery.

*Murray Oil Products Co. v. Mitsui & Co. Ltd.*, 55 F. Supp. 353 (S. D. N. Y.), affirmed, 146 F. 2d 381 (C. A. 2), discussed at length by petitioner McCarthy (Brief in No. 314, 315, p. 34 *et seq.*), decided only the merits of an attaching creditor's claim against his debtor. The Court expressly reserved decision on the issue here presented—the attaching creditor's rights *vis-a-vis* the Custodian—pointing out (p. 356) that it would be necessary for the plaintiff to apply to the Custodian for payment.

Appeals that it believed jurisdiction might be exercised on the basis of a writ of attachment directed against a nonresident's blocked property. But while petitioners repeatedly emphasize this aspect of the Treasury's position, they are prone to overlook, throughout their arguments, the limiting condition: That no interest in the property might pass unless and until a license was obtained. The Government's brief in the *Polish Relief* case stated:

An attachment action against a national's blocked account is an attempt to obtain an unlicensed assignment of the national's interest in the blocked account—nothing more and nothing less.

In this sense, the attachment action might be regarded as a levy upon the national's contingent power (i. e. contingent upon Treasury authorization) to transfer all his interest in the blocked account to A; any judgment in the attachment action resulting in giving A a contingent interest in the account equivalent to what he would have obtained by voluntary assignment.

The value of such an interest is of course problematical. Whether it is worthless or worth full value will depend upon whether the transfer sought is in accordance with the Government's policies in administering freezing control.

Under this analysis of what the nature of any attachment action against a blocked account must be, in the light of the pur-

poses of freezing control, it is suggested that an attachment action of this nature might well be allowed in the New York courts.

The fact that the contingent interest involved in an attachment action such as that in question is *null and void unless authorized by the Secretary of the Treasury* should not be regarded as preventing such contingent interest from being the basis for an attachment action. An interest which is *null and void unless authorized by the Secretary* is not the same as an interest which is *null and void* unconditionally. Many of the interests which have already been the subject of attachment in the New York courts were also, from a realistic point of view, conditionally null and void. The fundamental issue, as indicated by the decisions in the New York courts, is whether the interest involved may, upon the happening of a certain condition ripen into a vested interest. If this is possible, and the condition is not too unreal, the courts will allow the attachment action. It is believed that the condition that the Secretary of the Treasury may authorize a transfer, if such transfer is in accordance with the policies of the Federal Government, is not too unreal a condition. [pp. 52-53.] [Italics in original.] "

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" A copy of this brief is being filed with the clerk.

The Court of Appeals adopted the Treasury view. It declared, first, that "the words of the Chief Executive of the nation must be taken to have *deprived the defendant of power to transfer any interest* in these blocked accounts except through the medium of assignment subject to a releasing of the credit by the Secretary of the Treasury", 288 N. Y. at p. 337, 43 N. E. 2d at p. 347 [italics added]. It then went on to hold that the attachments were nonetheless sufficient to permit an adjudication of the rights of the parties, stating (288 N. Y. at p. 338, 43 N. E. 2d at p. 347):

The Executive Order did not forbid attachment of the conceded interest of the defendant in the credits upon which the levies were made. For all we know, payment of the blocked accounts to the credit of this action can be permitted consistently with the purpose of the Order. We are not to presuppose that this will inevitably be refused in the event of a judgment for the plaintiff. \* \* \* The lien of an attachment is always hypothetical in some degree. A "seizure subject to license" was, we think, sufficient for the purpose of jurisdiction in rem over the deposits in question.

Three dissenting judges took the position that the "interest" sought to be attached was too "illusory" and that the cause should not be entertained (288 N. Y. at p. 341, 43 N. E. 2d at p.

349). In reaching their respective decisions, however, both the majority and the dissenting judges explicitly determined that, in the face of the Executive Order, neither the attachment nor the judgment of the court could transfer any interest in the funds in the absence of a license.

Petitioners also question the correctness of the Treasury position. They say that under the doctrine of *Pennoyer v. Neff*, 95 U. S. 714, a court has no jurisdiction over a nonresident defendant unless there is a valid seizure of his property within the state. It is apparently their view that a "seizure subject to license" could not confer jurisdiction and that any judgment based upon such a "seizure" would suffer from constitutional infirmities. Accordingly, they urge that the Treasury's statements that suits might be instituted by attachment should be interpreted (notwithstanding the limiting condition stated) to mean that an attaching creditor required no license in order to acquire an indefeasible lien interest in blocked property.

We do not believe that the doctrine of *Pennoyer v. Neff* leads to any such conclusion.<sup>25</sup> The decisions clearly indicate that if there is property of a nonresident within a state and

<sup>25</sup> In *Pennoyer*, the state court had no personal jurisdiction over the nonresident and no process whatever had been issued against his land within the state prior to judgment. The holding was that an execution sale of the land based on a purported personal judgment would not be given full faith and credit in the federal courts.

some means whereby the court may assert control over that property, jurisdictional requirements are satisfied, provided reasonable notice is given. Chief Justice Holmes stated in *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 78, 55 N. E. 812, 815, that "when it is considered how purely formal such an act [seizure] may be, and that even adverse possession is possible without ever coming to the knowledge of a reasonably alert owner, I cannot think that the presence or absence of the form makes a constitutional difference." That there is no requirement of an unconditional or absolute seizure is emphasized by this Court's decision in *Securities Savings Bank v. California*, 263 U. S. 282, which involved an action brought by California against a local bank to have unclaimed deposits transferred to the State and declared escheat. It was held that notice to foreign depositors by publication was sufficient although there had been no actual seizure of the funds. Mere service of the complaint upon the bank was found to meet constitutional requirements. Cf. *Pennington v. Fourth National Bank*, 243 U. S. 269. And see also *The Requirement of Seizure in the Exercise of Quasi in Rem Jurisdiction: Pennoyer v. Neff Re-examined*, 63 Harv. L. Rev. 657 (1950).

The same jurisdictional principle is reflected in the statutes of New York and other states.

Thus, Section 232 (6) of the New York Civil Practice Act authorizes service of nonresidents by publication "where the complaint demands judgment that the defendant be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state."<sup>24</sup> That course was followed in *Feuchtwanger v. Central Hanover Bank and Trust Co., et al.*, 288 N. Y. 342, 43 N. E. 2d 434, in which the plaintiff sought to impress a trust upon certain deposits held by a New York bank in the name of a French bank. Rejecting the argument of the defendants that there was no jurisdiction over the French bank because there had been no seizure by attachment, the New York Court of Appeals, citing this Court's decision in *Securities Savings Bank v. California*, *supra*, stated that it was enough that there was "property within this State . . . subject to its dominion" (288 N. Y. at p. 345, 43 N. E. 2d at p. 435). To the same effect see *Pilger v. Sutherland*, 57 F. 2d 604 (C. A. D. C.); *Doerschuck v. Mellon*, 55 F. 2d 741 (C. A. D. C.); *Tyler v. Judges of the Court of Registration*, *supra*; *Disconto Gesellschaft v.*

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<sup>24</sup> The United States Judicial Code contains a substantially similar provision, 28 U. S. C. § 1655. Its operation is not dependent upon a seizure. *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1; *Continental Trust Co. v. Shunk Plow Co.*, 263 Fed. 873 (C. A. 5), certiorari denied, 253 U. S. 488.

*Umbreit*, 127 Wis. 651, 106 N. W. 821, affirmed on other grounds, 208 U. S. 570.<sup>25</sup>

Further evidence that a seizure is not constitutionally necessary in order to confer jurisdiction over a nonresident is the fact that in numerous states service of a writ of garnishment or attachment is not deemed to give a lien or other property interest prior to judgment or execution thereon. In the course of his dissenting opinion in *Sanders v. Armour Fertilizer Works*, 292 U. S. 190, 206-207, Justice Cardozo, speaking of "proceedings under writs of garnishment or attachment", observed that in Illinois the writ is "in substance \* \* \* a monition whereby the defendant is apprised that he will be acting at his peril if he makes a *voluntary* payment to the original creditor, the peril consisting in this, that he may have to pay again."<sup>26</sup> The Justice added that in some jurisdictions the service of the writ

<sup>25</sup> In the *Disconto Gesellschaft* case, the Supreme Court of Wisconsin stated (127 Wis. at pp. 670-671, 106 N. W. at pp. 826-827) :

"It has also been held by this court \* \* \* that it is not essential that the property within the state be seized by writ of attachment, but that, if the facts required by the statute to authorize the order for publication appeared by proper affidavit, the court would acquire jurisdiction to render a judgment good at least against the property described in the moving papers, providing it had not been removed from the state or sold to an innocent purchaser before the rendition of the judgment."

<sup>26</sup> This was the nature of attachment according to the custom of London "from which \* \* \* have sprung the systems of attachment laws in the United States." *Drake on Attachment*, 7th Ed., 1891, Sec. 450.

is held to impose "a fixed and present lien", that sometimes the lien is "spoken of as a *quasi* lien or an inchoate one", and that "sometimes the Illinois rule is accepted, and there is said to be no lien, or one that does no more than restrain the garnishee from making voluntary payments. \* \* \* Little is to be gained by dilating upon these and like decisions, for they are rooted in local laws or customs. Garnishment and attachment today are statutory remedies."<sup>27</sup>

Only recently this Court had occasion to consider whether a California attachment procured by an individual creditor was senior to a United States tax lien filed at a later date. *United States v. Security Trust and Savings Bank*, 340 U. S. 47. Holding that the tax lien took precedence, Mr. Justice Minton, speaking for the Court, pointed out that California decisions indicate that "the attaching creditor obtains only a potential right or a contingent lien." He added (340 U. S. at p. 50):

\* \* \* Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a

<sup>27</sup> See also *In re Marsters*, 101 F. 2d 365 (C. A. 7), certiorari denied, 306 U. S. 663; *Cramer v. Phoenix Mutual Life Ins. Co.*, 91 F. 2d 141 (C. A. 8), certiorari denied, 302 U. S. 739; *Ex Parte Foster*, 9 Fed. Cas. 508 (C. C. D. Mass.); *Pennsylvania Co. v. United Railways*, 26 F. Supp. 379 (D. Me.); *Bowen v. Port Huron Engine & Thresher Co.*, 109 Ia. 255, 80 N. W. 345; *Matsuda v. Noble*, 200 P. 2d 962 (S. Ct. Or.); *Newberry v. Meadows Fertilizer Co.*, 203 N. C. 330, 166 S. E. 79.

judgment awarded and recorded. Thus the attachment lien is contingent or inchoate—merely a *lis pendens* notice that a right to perfect a lien exists.

Nor can the doctrine of relation back—which by process of judicial reasoning merges the attachment lien in the judgment and relates the judgment lien back to the date of attachment—operate to destroy the realities of the situation. \* \* \*

It is plain that the perfecting of an attachment lien may be subject to “numerous contingencies” under state law. It is equally clear, where blocked property is concerned, that the federal government may add the further condition that a license must be obtained. This does not mean that the New York courts were without power or jurisdiction to adjudicate the rights of these petitioners as against the German depositors. Jurisdiction could be predicated upon the presence of the blocked property within the state, coupled with notice by publication. The function of attachment procedure in providing a foundation of jurisdiction is discrete from the function, which it also frequently serves, of providing immediate security to the plaintiff.<sup>28</sup> This distinc-

<sup>28</sup> \* \* \* those actions which the courts have considered to constitute a ‘seizure’ for jurisdictional purposes have not always been treated as assuring plaintiff’s security interest; \* \* \* the law of jurisdiction, and the law of liens and priorities, have developed without cross-fertilization.” *The Requirement of Seizure in the Exercise of Quasi in Rem Jurisdiction: Pennoyer v. Neff Re-Examined*, 63 Harv. L. Rev. 657, 670.

tion was the basis of the Treasury's declaration that freezing did not prohibit recourse to the state courts and to their judicial process (including writs of garnishment and attachment), although it did prevent, absent a license, the acquisition of any proprietary interest in blocked funds. The same distinction underlies the decision in the *Polish Relief* case in which the New York Court of Appeals, taking full account of the Treasury regulations, held that service of a writ of attachment on a New York Bank holding a nonresident's blocked funds was "sufficient for the purpose of jurisdiction" although the "seizure [was] subject to license."

Respondent does not contend that the attachments were absolutely void or that they were illegal. He agrees that freezing did not purport to prohibit the resort to judicial process. He states simply that transfers in blocked property were proscribed and that the judicial hand was stayed to that extent. Not attachments, but transfers, were controlled. That means that a fixed or absolute lien (as distinguished from "a potential right or a contingent lien") could not be created without a release of the property from federal control. Since the perfecting of a fixed lien is characteristically subject to numerous contingencies under state law, *e. g.*, the entry of a judgment in plaintiff's favor, it would seem clear that the imposition of a further condition by operation of federal law—the procurement of a

license—is not inconsistent with proceedings by way of attachment.

In effect, then, the Treasury said this:—Blocked property is subject to a federal injunction against transfer. This does not prevent a state court from issuing a writ which also directs the holder of the blocked property to keep it intact. And if the state court, in these circumstances, regards its own process as offering a sufficient promise of control to warrant an exercise of its jurisdiction, there is no objection to its declaring the rights of a suitor as against the owner of the blocked property. But the state court's power to confer a proprietary interest upon the suitor necessarily awaits a lifting of the federal injunction.

Even if we assume *arguendo* that the Treasury was wrong in its belief that such a limited or contingent control of the property would enable a state court to adjudicate the rights of the private parties, and that the New York Court of Appeals was likewise wrong in holding a "seizure subject to license" an adequate foundation of jurisdiction (*Polish Relief* case, *supra*), there is still no blinking the fact that the Order and the Regulations did not permit any other kind of "seizure." The Order forbade "all transfers." The Regulations define "transfer" to include "the creation or transfer of any lien" (General Ruling 12, par. 5 (a)) and explicitly declare that "an unlicensed attachment \* \* \* cannot operate to

transfer or create any interest in blocked property" (Public Circular No. 31, par. 3). The court below correctly determined that petitioners failed to acquire the property interests which they claim.<sup>28</sup>

## II. THE DISTRICT COURT WAS A PROPER FORUM FOR THESE PROCEEDINGS

Petitioners argue that the Custodian is engaged in a collateral attack on their New York judgments and that the courts below failed to accord those judgments full faith and credit. These arguments are rested on the assertion that "by this constructive seizure the state court took exclusive custody and control of the attached debts" (Brief in No. 298, p. 43). The premise is utterly false. The state court writs were issued *after* the federal government had asserted its paramount power over the alien property and they were necessarily subject to the federal controls. True, those writs in terms forbade the banks "to make or suffer any transfer of the debts" (*idem.*). But what petitioners overlook is that the President had previously enjoined all transfers of the funds (Executive

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<sup>28</sup> As held below, petitioner McCloskey's claim to sheriff's poundage fees turns on whether the other petitioners acquired proprietary interests. If, as respondent contends, the property was federally controlled and the state's exercise of dominion was contingent upon a release of federal authority, it follows that the property was not impounded by the sheriff, either actually or constructively. The sheriff's fees for the ministerial acts of serving the writs have been paid and are not in issue here.

Order No. 8389), including transfers by judicial process. *Propper v. Clark*, 337 U. S. 472. The state court's assertion of control was, therefore, limited and conditional; it could not operate to dispose of interests in the property unless and until the earlier federal injunction was lifted. It is for that very reason that this Court held in *Propper* that a state court's appointment of a permanent receiver pursuant to a New York judgment was ineffective to confer title upon him in the absence of a federal license. There is no question of full faith and credit for the simple reason that the New York judgments never became operative with respect to property therefore blocked by the President.

Petitioners also urge that, as a matter of comity, the Custodian should have been required to go into the state courts for a clarification of his rights. Again, the *Propper* case is absolutely decisive against them. There, also, the Custodian went into the federal courts for a declaration of his rights under a vesting order. His course was upheld, notwithstanding the fact that the New York court had already entered a judgment purporting to bestow title to the property in issue upon a receiver. Following its earlier decision in *Markham v. Allen*, 326 U. S. 490,<sup>20</sup> the Court stated (337 U. S. at p. 493):

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<sup>20</sup> In *Allen*, Chief Justice Stone, speaking for the Court, declared that Section 17 of the Trading With the Enemy Act "plainly indicates that Congress has adopted the policy of

The congressional purpose to put control of foreign assets in the hands of the President through the Custodian, so that there might be a unified national policy in the administration of the Act, argues strongly for federal determination of issues of rights in the blocked assets. Comity does not require abnegation to the extent that a federal court cannot adjudicate rights to the claim involved.

It should be noted further that in *Propper* there was an antecedent question of state law, whether an appointment of Propper as *temporary* receiver *prior* to freezing had given him title.<sup>21</sup> *A fortiori*, where, as here, there was no disputed issue of state law, the exercise of federal jurisdiction<sup>22</sup> was entirely appropriate.

permitting the Custodian to proceed in the district courts to enforce his rights under the Act, whether they depend on state or federal law" (326 U. S. at p. 496).

<sup>21</sup> It was the appointment as permanent receiver which post-dated the order.

## CONCLUSION

For the foregoing reasons, the judgments of the Court of Appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1951.

## APPENDIX

### 1. Joint Resolution of May 7, 1940, 54 Stat. 179:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:*

*"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production*

of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

\* \* \* \* \*

2. Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. 1 et seq:

\* \* \* \* \*

SEC. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 5:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any

property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; \* \* \* and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

\* \* \* \* \*

SEC. 17. That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary."

\* \* \* \* \*

SEC. 34. (a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1-6 of the Criminal Code (18 U. S. C. 1-6), title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute

of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (50 U. S. C. 21); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principles or predecessors would have been.

(b) The Custodian shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. In no event shall the time extend beyond the expiration of two years from the date of the last vesting in or transfer to the Custodian of any property or interest of a debtor in respect of whose debts the date is fixed, or from the date of enactment of this section, whichever is later. No debt shall be paid prior to the expiration of one hundred and twenty days after publication of the first such notice in respect of the debtor, nor in any event shall

any payment of a debt claim be made out of any property or interest or proceeds in respect of which a suit or proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of such one hundred and twenty days.

(c) The Custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part.

(d) Payment of debt claims shall be made only out of such money included in, or received as net-proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof, paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof to the extent permitted by the money available and additional payments shall

be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. The Custodian shall not be required through any judgment of any court, levy of execution, or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim.

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in

its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian.

todian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

(g) Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed \$600; (2) claims entitled to priority under sections 191 and 193 of title 31 of the United States Code, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the claimant; (4) all other debt claims. No payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d)

hereof, payment may be made permits payments in full of all allowed claims in every prior class.

(h) No debt of any kind shall be entitled to priority under any law of the United States or any State, Territory, or possession thereof, or the District of Columbia, solely by reason of becoming a debt due or owing to the United States as a result of its acquisition by the Alien Property Custodian.

(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: *Provided*, That no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against

the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.

3. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897:

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I FRANKLIN D. ROOSEVELT, PRESIDENT OF THE UNITED STATES OF AMERICA, do prescribe the following:

SEC. 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of, any foreign country designated in this Order, or any

national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent, outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coins or bullion or currency, by any person within the United States;

E. All transfers, withdrawals, or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

\* \* \* \* \*

SEC. 3. The term "foreign country designated in this Order" means a foreign country included in the following schedule, and the term "effective date of this Order" means with respect to any such foreign

country, or any national thereof, the date specified in the following schedule:

(j) June 14, 1941—

Germany

SEC. 5.

E. The term "national" shall include,

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,

F. The term "banking institution" as used in this Order shall include any person engaged primarily or incidentally in the business of banking, of granting or transferring credits, or of purchasing or selling foreign exchange or procuring purchasers and sellers thereof, as principal or agent, or any persons holding credits for others as a direct or incidental part of his business, or brokers; and, each principal, agent, home office, branch or correspondent of

any person so engaged shall be regarded as a separate "banking institution."

\* \* \* \* \*

SEC. 7. Without limitation as to any other powers or authority of the Secretary of the Treasury or the Attorney General under any other provision of this Order, the Secretary of the Treasury is authorized and empowered to prescribe from time to time regulations, rulings, and instructions to carry out the purposes of this Order and to provide therein or otherwise the conditions under which licenses may be granted by or through such officers or agencies as the Secretary of the Treasury may designate, and the decision of the Secretary with respect to the granting, denial or other disposition of an application of license shall be final.

\* \* \* \* \*

#### 4. General Ruling No. 12, United States Treasury Department, April 21, 1942, 7 F. R. 2991:

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of [Executive Order No. 8389, see General Ruling No. 4, par. (1), *supra*] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

(2) Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order.

(3) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5 (b) of the Trading With the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated; *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

(5) For the purposes of this general ruling:

(a) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power; *Provided, however,* That the term "transfer" shall not be deemed to include transfers by operation of law.

(b) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2 (1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable

documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

(c) The term "blocked account" shall refer to a blocked account (including safe deposit box) of a party to the transfer and shall have the meaning prescribed in General Ruling No. 4 except that it shall not be deemed to include an account not treated as a blocked account by the person with whom such account is held or maintained.

(d) The term "effective date of the Order" shall have the meaning prescribed in General Ruling No. 4 except that "the effective date of the Order" as applied to any person whose name appears on The Proclaimed List of Certain Blocked Nationals shall be the date upon which the name of such person first appeared on such list.

(e) The term "transfer by operation of law" shall be deemed only to mean any transfer of any dower, curtesy, community property, or other interest of any nature whatsoever, provided that such transfer arises solely as a consequence of the existence or change of marital status; any transfer to any person by intestate succession; any transfer to any person as administrator, executor, or other fiduciary by reason of any testamentary disposition; any transfer to any person as administrator, executor, or fiduciary by reason of judicial appointment or approval in connection with any testamentary disposition or intestate succession; and any transfer pursuant to (i) Netherlands Royal Decree of May 24, 1940, and (ii) Norwegian Pro-

visional Decree of April 22, 1940, concerning the monetary system, etc.

(6) Nothing contained in this general ruling shall be deemed to affect in any way criminal liability for violation of the Order, or the regulations, rulings, circulars, or instructions issued thereunder, or in connection therewith, or to otherwise modify any provision thereof.

By direction of the President.

5. Public Circular No. 31, United States Treasury Department, August 2, 1946, 11 F. R. 8351:

(1) Reference is made to General Ruling No. 12 relating to unlicensed transfers of blocked property. Reference is also made to General Ruling No. 19 relating to the release of Treasury controls over property vested by the Alien Property Custodian. This circular deals with the effect of such release on unlicensed attachments levied with respect to blocked property prior to the vesting thereof by the Custodian.

(2) Under paragraph (1) of General Ruling No. 12, interests in blocked property cannot be acquired, transferred, or created by unlicensed "transfers." Nor may an unlicensed transfer be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any blocked property.

(3) An attachment is a "transfer." See paragraph (5) of General Ruling No. 12 where the term "transfer" is defined as including "the issuance, docketing, filing, or other levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment." An

unlicensed attachment, therefore, cannot operate to transfer or create any interest in blocked property. Nor can it serve as a basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any blocked property.

(4) Paragraph (4) of General Ruling No. 12 does not constitute a license authorizing the seizure or creation of any interest in blocked property by attachment proceedings or other legal process. This paragraph merely is a formal statement of the position which the Treasury Department has always taken with respect to litigation affecting blocked property—that it does not desire to interfere with such litigation so long as it is clearly understood that the judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property. Thus, the proviso of paragraph (4) specifies that “no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.” In issuing paragraph (4), the Treasury Department did not undertake to decide for the courts whether they should exercise jurisdiction. It simply prescribed that jurisdiction could be exercised only on the basis that if a Treasury license was not issued, the judicial process could not operate to transfer or create any interest in blocked property, nor could it be the basis for the assertion or recogni-

tion of any other right, remedy, power, or privilege with respect to the property.

(5) The Treasury Department has always considered that when the Alien Property Custodian has vested any property, it would not be in the national interest for the Treasury Department thereafter to grant licenses authorizing the creation or acquisition of any interest in the property. Formerly it was the practice of the Department, whenever it was notified by the Custodian that a particular property had been vested, to issue a specific release to the Custodian of all control of the property under Executive Orders Nos. 8389 and 9193. Paragraph (1) of General Ruling No. 19 constitutes a general release of such control in the case of all German and Japanese property vested by the Custodian. Paragraph (2) of the General Ruling is intended to make it clear that a release of control over any vested property to the Alien Property Custodian, whether by specific release or by reason of the General Ruling, operates as a final denial by the Secretary of the Treasury of any pending application for license or other authorization relating to such property and that no application for a license authorizing the creation, acquisition, or transfer of any interest in such property will thereafter be entertained or granted. The paragraph is thus a formal statement of what has always been the position of the Treasury Department—namely, that once blocked property has been vested by the Custodian, there is no longer any possibility that an unlicensed attachment may ripen through the issuance of a Treasury license into a seizure and acquisition of an interest in such blocked property.

(6) In view of the fact that the Alien Property Custodian has publicly announced his intention of vesting all German and Japanese property in the United States, it will be the general policy of the Treasury Department not to grant any licenses authorizing the creation or acquisition through legal process of any interest in blocked German or Japanese property.

6. Press Release No. 34, April 21, 1942, *United States Treasury Department: Documents Pertaining to Foreign Funds Control* (1946), pp. 71-73:

The Treasury Department, in a formal statement issued today, called attention to the fact that all unlicensed transfer of blocked assets in the United States are void and unenforceable.

General Ruling No. 12, issued by the Secretary of the Treasury, makes clear that unlicensed transfers of blocked assets in violation of the freezing orders, and transfers designed or having the effect of evading such orders, always have been void and unenforceable.

Secretary Morgenthau, commenting on today's general ruling, pointed out that these unlicensed transfers of blocked assets always have been void and unenforceable under the freezing orders and that today's ruling serves the purpose of emphasizing this fact for the benefit of any of the public who may have overlooked this aspect of freezing control.

He also called attention to the provisions of the ruling, making it possible for persons who have been parties to unlicensed transfers of blocked assets to file applications for licenses to validate these transfers.

"The Treasury, of course, wants to be reasonable about this matter," he stated. "We do not propose to allow our regulations, intended for the protection of our country and the United Nations, to become an instrumentality for defeating their interests or producing unconscionable advantages or unreasonable hardships. These matters can be dealt with by licenses, without undue interference with the purposes of freezing control."

Treasury officials pointed out that there are more than 7 billion dollars in blocked assets in the United States. The Government's policy on this matter, as reflected in today's formal ruling, has nullified attempts by the Axis to gain title to the billions of dollars in assets belonging to nationals of the countries overrun by the Axis. It has defeated efforts of the Axis to wrest control of such assets away from their lawful owners and hold them in the hopes that in the postwar period it will be possible to realize on such assets if freezing restrictions are lifted. Of equal significance is the fact that it has destroyed any possible black market in neutral countries for blocked assets—one of the ways the Axis would like to be able to obtain the foreign credit necessary to finance imports from neutral countries into Axis territory and also one of the ways the Axis would like to be able to gain the funds necessary to subsidize espionage, sabotage, and fifth-column activities in the United Nations, Latin America, and elsewhere.

Treasury officials explained that, based on the evidence of what the Axis was doing with assets of the overrun countries within their physical control, Axis efforts in an operation of this character would follow no

single pattern. Rather, they would run the gamut from outright duress—assignments at the point of a gun or with the Gestapo as “witnesses”—through to the more subtle “legal” transfers—the purchase of such blocked assets against payment in local currency obtained as occupation costs or by forced loan from banking institutions in the occupied areas. In these latter cases the point of the gun would not be leveled at the individual, but would be leveled at the central bank and “Quisling” governments who would provide the credit for the Axis to “buy” their country’s birthright.

The net effect of such transfers would not vary, however, they would be intended to mulct the overrun countries of the very life-blood of any postwar reconstruction, namely, the foreign exchange needed to obtain the goods and services necessary for rebuilding the economies of these countries. Axis war psychology would be benefited also—by depriving the holders of their title to these assets the Axis would encourage a spirit of defeatism and a willingness to succumb to the German “new order.”

Officials also explained that, based on the operation of the neutral black market in looted assets physically in the control of the Axis, it was easy to anticipate the type of black market the enemy might try to foster for “blocked assets.” This neutral blackmarket operation would be designed to give the Axis immediate returns on blocked assets even though the Axis could not get such assets out from under our freezing regulations. In this case the assets would be assigned or otherwise transferred to neutral speculators at heavy discount in order that the Axis could obtain credit now to buy goods and services in neutral coun-

tries and thus assist the war effort. Of course some of these blackmarket operations would be for the obvious purpose of lining the pockets of Axis officialdom as insurance against the day when the Axis is crushed. Neutral speculators would either hold such assignments with the intent of salvaging on them after the war or in the hope of being able to squeeze the blocked assets through the freezing control by one trick or another.

As was pointed out, since freezing control makes null and void, or unenforceable all transfers with respect to blocked assets unless licensed by the Secretary of the Treasury, Axis attempts to gain title to these assets are frustrated and the true owner's interests are protected and he continues to have a valuable stake in a victory by the United Nations.

Commenting upon today's ruling, Secretary Morgenthau stated: "This Government served notice on the world when we froze the assets of Norway and Denmark on April 10, 1940, that we did not intend to permit the Axis to realize any use or benefit from Norwegian and Danish assets in the United States. Since that time we have consistently pursued this policy with respect to every country falling under the Axis yoke. The policy of this Government always has been unequivocal. We will not allow the Axis, directly or indirectly, to gain any interest in the 7 billion dollars in blocked assets in this country. Neither those funds nor any interest in them will be used against the United Nations by the Axis. Neither will they be used as a part of Germany's economic 'new order' in Europe or Japan's 'co-prosperity sphere' in the Pacific."

It was emphasized that, while freezing control attempted to interfere as little as possible with normal legitimate commercial transactions, still the Government was combatting a menace of sweeping proportions and was compelled to block all corrosive efforts of infiltration through loopholes. Freezing control and the Government's policy is therefore comprehensive and the licensing technique must be freely used to prevent hardship in legitimate cases. Thus, under the freezing orders, more than 80 general licenses have been issued, permitting vast categories of transactions under appropriate safeguards without even filing an application. In addition, more than 400,000 specific licenses also have been issued.

Paragraph (1) of today's general ruling deals with unlicensed transfers made after the effective date of the freezing orders involving property in blocked accounts. If any such transfer was made after the account was actually blocked, then the transfer is null and void unless licensed. Thus, if a bank blocked the account of a national of Denmark on April 10, 1940, and on June 10, 1940, the national attempted to assign title to the account to a German, the transfer would be null and void unless the Treasury licensed it. On the other hand, if a transfer were made before the account was actually blocked, but attempt was made to enforce it while the account was in fact blocked, the transfer would be unenforceable. By way of example; On July 15, 1941, John Doe, resident in Argentina, assigned his account with an American bank to Richard Roe in the United States. On September 15, 1941, the Treasury instructed the bank to block

the account of John Doe as a national of Rumania. After September 15, 1941, the assignment would be unenforceable against John Doe's blocked account unless the transfer were licensed by the Treasury Department.

Paragraph (2) of the general ruling deals with transfers alleged to have been made before the effective date of the freezing orders but involving accounts thereafter blocked. These transfers are unenforceable against blocked accounts unless the person with whom the blocked account was held or maintained had written notice of the transfer or had recognized it in writing prior to the effective date of the Order. Thus, if in the example above, the national of Denmark had assigned the bank account to the German in 1937 and the bank was not notified of the assignment until June 10, 1940, the assignment would be unenforceable against the blocked account unless licensed. If, on the other hand, the bank was notified in writing of the assignment before April 10, 1940, then the assignment is enforceable against the blocked account (but, of course, payment from the blocked account could only be made pursuant to Treasury license).

Treasury officials pointed out that the policy behind paragraph (2) of the general ruling was understandable. If the general ruling had been merely prospective in operation, it would be easy for Axis agents to validate transfers obtained under duress by the subterfuge of dating them prior to the effective date of the Executive Order. This would, of course, defeat one of the major purposes of freezing control. Officials pointed out that in those cases where

notice of the transfer was given to the person maintaining the account in this country and where the transfer had been accepted by that person as valid, the provisions of the general ruling are inapplicable since under those circumstances the notice is an adequate precaution to guarantee that the transfer was made prior to the effective date of freezing control.

Paragraph (3) of the ruling provides that a license issued by the Treasury Department, either before or after a transfer, completely validates the transfer for the purposes of freezing control. Of course, if an assignment would have been invalid without freezing control (e.g., because not properly executed), a Treasury license does not purport to remedy this type of invalidity.

Paragraph (4) is but a formal statement of the position which the Treasury Department has always taken on litigation (including attachments) affecting blocked assets. The Treasury has no desire to limit the bringing of suits in courts within the United States: *Provided*, That no greater interest is created by virtue of the attachment, judgment, etc., than the owner of the blocked account could have voluntarily conferred without a license. Thus, the Treasury does not want to interfere with the orderly consideration of cases by the courts provided that the results of court proceedings are subject to the same policy consideration from the point of view of freezing control as those arising through voluntary action of the parties.

Paragraph (5) defines various terms employed in the ruling. For example: the term "transfer" is given a very comprehensive meaning, excepting only certain

types of transfers by operation of law (e.g., transfer by intestate succession). The term "property" is broad but by and large does not include mere chattels or real property. The term "blocked account" is in effect limited to accounts actually treated as blocked accounts by the person with whom such account is held or maintained.

Paragraph (6) is technical in character and reserves the full right of the Government to prosecute for violations of the freezing orders and emphasizes that General Ruling No. 12 is not intended to modify outstanding freezing orders, regulations, etc.

